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# THE HIDDEN GENDER OF GENDER-NEUTRAL PAID PARENTAL LEAVE: EXAMINING RECENTLY-ENACTED LAWS IN THE UNITED STATES AND AUSTRALIA

Deborah A. Widiss<sup>†</sup>

## INTRODUCTION

The United States and Australia are generally considered laggards when it comes to parental leave policy. Until just over a decade ago, they were notable as the only highly-developed economies that failed to guarantee employees paid time off with a new baby,<sup>1</sup> and the U.S. still lacks a federal law. But recent developments mean the countries are also innovators in parental leave policy. In virtually every other country in the world, legislation guarantees new mothers much longer leaves than new fathers; roughly half of all countries provide *just* maternity leave, lacking paternity or gender-neutral parental leaves entirely.<sup>2</sup> Australia's federal paid leave law, enacted

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<sup>†</sup> Professor of Law, Indiana University Maurer School of Law. This project was based on research I conducted as a Fulbright Senior Scholar (Feb.–June 2018). My thanks to the Australian-American Fulbright Commission and the University of Melbourne Law School for their generous support of this project; the research was also supported by an Indiana University Grant-in-Aid of Research, Indiana University Maurer School of Law sabbatical funding, and an Indiana University Maurer School of Law summer research grant. I am grateful to Marion Baird, Jennifer Baxter, Anna Chapman, Sara Charlesworth, Amanda Cooklin, Rae Cooper, Beth Gaze, Belinda Hewitt, Belinda Smith, Miranda Stewart, Peter Whiteford, and Gillian Whitehouse for conversations about the ideas that became this Article and for insightful suggestions on earlier drafts, as well as two anonymous reviewers for their suggestions. I also benefited from questions and comments I received when presenting the project at the 2018 Gender, Work, and Organisations Conference and 2018 Association of Industrial Relations Academics of Australia and New Zealand Conference, as well as seminars at the University of Melbourne, Australian National University, University of Sydney, and LaTrobe University. I am grateful as well for the suggestions and research support I received from Indiana University Maurer students Bailey Anstead, Julie Ardean, Rachel Pawlek, and Allison Pulliam and from the editorial staff of the *Comparative Labor Law and Policy Journal*.

1. See, e.g., REBECCA RAY ET AL., CTR. FOR ECON. & POL'Y RES., PARENTAL LEAVE POLICIES IN 21 COUNTRIES: ASSESSING GENEROSITY AND GENDER EQUALITY 7 (June 2009), <http://www.lisdatacenter.org/wp-content/uploads/parent-leave-report1.pdf> (“The United States is one of only two [wealthy] countries—Australia is the other—to offer no paid parental leave.”).

2. See generally LAURA ADDATI ET AL., INT'L LABOUR ORG. (ILO), MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD (2014), <https://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—>

in 2009,<sup>3</sup> and several new American state laws,<sup>4</sup> are notably different. They have been gender-neutral since their inception. Thus, they offer an important new approach to parental leave policy.

To simply label both countries' policies regarding leave for new parents as gender-neutral, however, obscures fundamental structural differences. The U.S. state programs—which collectively cover more than a quarter of the U.S. population—offer equal, individual, non-transferable benefits, ranging from four to twelve weeks, to each parent.<sup>5</sup> A recently-enacted policy for federal workers is structured analogously.<sup>6</sup> Australia, by contrast, has an asymmetrical structure, in that it provides eighteen weeks of benefits to a primary caregiver and just two weeks of benefits to a secondary caregiver.<sup>7</sup> This Article shows how the countries' paid leave laws relate to pre-existing laws providing unpaid leave and doctrinal and theoretical debates regarding what equality means in the context of pregnancy and childbirth.<sup>8</sup> American law prioritizes formal equality in how men and women are treated, reflecting a concern that preferential treatment of women reifies traditional gender norms and increases the risk of discrimination in hiring or promotion. Australian law, by contrast, has long permitted special benefits for women in connection with their role as mothers, premised on a substantive conception of equality that suggests that differential treatment may be essential to equalize opportunity.

These competing conceptions of equality are still relevant, notwithstanding the gender-neutral structure of the modern laws. U.S. laws encourage each parent to be equally involved in caregiving, and families forfeit benefits if they do not structure care this way. By contrast, Australian law continues to facilitate care by a single parent, the “primary carer,” while allowing families the freedom to choose which parent plays this role. In other

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publ/documents/publication/wcms\_242615.pdf (finding paternity leave offered in 79 out of 167 countries, and parental leave offered in 66 countries, most or all of which also offer paternity leave).

3. See *Paid Parental Leave Act 2010* (Cth) (Austl.) <<https://www.legislation.gov.au/Details/C2018C00165>>.

4. See CAL. UNEMP. INS. CODE §§ 3300–3306 (West 2019); COLO. LEGIS. SERV. INT. PET. 118 (2020) (to be codified at COLO. REV. STATS. §§ 8-13.3-401–421); 2019 Conn. Legis. Serv. P.A. 19–25 (S.B. 1) (West); D.C. CODE §§ 32–541.01 to –541.09 (2017); 2018 Mass. Acts. ch. 121 (to be codified at MASS. GEN. LAWS ch. 175M §§ 1–37); N.J. STAT. ANN. §§ 43:21–25 to –65 (West); N.Y. WORKERS' COMP. LAW §§ 200–242 (McKinney 2016); 2019 Or. Legis. Serv. Ch. 700 (H.B. 2005) (West) (not yet codified); 28 R.I. GEN. LAWS §§ 28–39–1 to –41; WASH. REV. CODE §§ 50A.04.005–50A.04.900 (2017). Hawaii has a state law that mandates short-term disability benefits; these may be used by birth mothers for time off for health conditions related to pregnancy and childbirth, but they are not intended to cover newborn care. See HAW. REV. STAT. §§ 392–1 to –101.

5. See *infra* Section II.A.

6. See Federal Employee Paid Leave Act, Pub. L. No. 116-92, §§ 1121–, 133 Stat. 1198 (2019) [hereinafter Federal Employee Paid Leave Act] (enacted as part of the National Defense Authorization Act for Fiscal Year 2020).

7. See *infra* Section II.B.

8. See *infra* Part III.

words, even gender-neutral leave policies can reflect distinctly different expectations of how parenting roles will, or should, be shared within families.

Early data shows the vast majority of parental leave in Australia is accessed by women. By contrast, in the American states that have implemented paid leave laws, men make up a relatively large, and growing, share of claimants; in some states, men's share approaches those of international leaders such as Sweden and Iceland.<sup>9</sup> If these patterns remain consistent as additional state laws and the new policy for federal workers are phased in, they may help shift norms around early childcare. But there are costs, as well as benefits, to the "same treatment" approach. Men's relatively high usage rates may be at least partially explained by the short duration of total leave available to families. Indeed, despite the important advances in American parental leave policy, support for working parents—both mothers and fathers—remains less robust in the United States than in Australia or most other developed countries.

This Article proceeds as follows. Part I summarizes the gender-specific approach to leave for new parents used by most other countries. Part II describes and contrasts the new American and Australian benefits laws. Part III shows how the countries' modern paid leave laws, while both gender-neutral, rest on distinctly different conceptions of what constitutes equality for women. Part IV reports initial data on gendered use patterns, relating these findings to the existing literature on leave policies in other countries. It also suggests additional possible explanatory factors for future empirical study, including the effect of gender-neutral leave policies that require a single person be designated as the primary caregiver. Research for this Article was largely completed and this Article was accepted for publication prior to the COVID-19 pandemic. However, Part IV also briefly discusses how the widespread economic and social disruptions caused by the pandemic might affect choices families make in the future.

#### I. INTERNATIONAL CONTEXT: MATERNITY, PATERNITY, AND PARENTAL LEAVES

The major international conventions governing labor policy explicitly prioritize leave for new mothers over leave for new fathers. In 1919, more than a century ago, the International Labour Organization (ILO), a United Nations agency that sets labor standards for member countries, adopted a convention calling for paid maternity leave; this recommendation was subsequently reaffirmed and broadened in conventions adopted in 1952 and 2000.<sup>10</sup> The modern convention calls for at least fourteen weeks of paid

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9. *See infra* Part IV.

10. ILO, Convention Concerning the Employment of Women Before and After Childbirth, No. 3, Nov. 28, 1919, 38 U.N.T.S. 53 [hereinafter *Maternity Protection Convention*] (*revised by* No 103, June 28, 1952, and No. 183, May 30, 2000, 2181 U.N.T.S. 255).

maternity leave, with the suggestion that at least six weeks be mandatory.<sup>11</sup> The ILO characterizes maternity protection as a “fundamental human right,” necessary to promote maternal and child health and to prevent workplace discrimination against women by making it possible for women to “combine their reproductive and productive roles successfully.”<sup>12</sup> The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the United Nations General Assembly in 1979, likewise asserts that paid maternity leave is an essential component of ensuring women’s equality.<sup>13</sup> By contrast, the ILO has never adopted a convention regarding time off for new fathers. Rather, it has issued recommendations and resolutions—which provide non-binding guidelines—suggesting that countries provide paternity leaves or parental leave available to either parent to supplement maternity leave.<sup>14</sup>

Most countries follow the approach outlined in these conventions, in that they provide much longer leaves to mothers than to fathers. According to a 2014 ILO report, “virtually every” country has legislation ensuring new mothers can take time off from work,<sup>15</sup> and only two countries (the United States and Papua New Guinea) fail to guarantee some form of cash benefits during such leave.<sup>16</sup> Ninety-eight countries—more than half of all countries—guarantee at least fourteen weeks of paid maternity leave.<sup>17</sup> By contrast, the ILO report finds only seventy-nine countries provide paternity leave at all, and only five countries provide a paternity leave of more than two weeks.<sup>18</sup>

Some countries have enacted supplemental leaves that may be used by either parent after maternity and paternity leave. These are usually known as “parental” leave. Parental leave has become relatively common in developed economies, but it remains rare in developing or less-industrialized parts of the world.<sup>19</sup> Typically, it is paid at a lower rate than maternity or paternity

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11. *See id.* 2181 U.N.T.S. 255.

12. ADDATI ET AL., *supra* note 2, at 1.

13. *See* United Nations (U.N.) Entity for Gender Equality & the Empowerment of Women, Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 34 U.N. GAOR Supp. (No. 21) (A/34/46), 19 I.L.M. 33, art. 11. <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

14. *See* ADDATI, *supra* note 2, at 60 (referencing Recommendation No. 191 and Recommendation No. 165); *see also id.* at 52 (referencing a 2009 ILC Resolution encouraging paternity leave). The ILO has adopted a convention calling for protections from discrimination for both mothers and fathers in connection with family caregiving. *See* ILO, Workers with Family Responsibilities Convention, No. 156, June 23, 1981, 1331 U.N.T.S. 295, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C156](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156).

15. ADDATI ET AL., *supra* note 2, at 3.

16. *See id.* at 16.

17. *See id.* at 9.

18. *See id.* at 53.

19. *See id.* at 64 (indicating 66 of 169 countries have parental leave provisions, but that outside the developed world it is usually unpaid, if it exists at all).

leave, or it may be entirely unpaid.<sup>20</sup> Parental leave may be allocated on a family basis or as an individual entitlement to each parent.

In general, mothers use a far greater share of gender-neutral parental leave than fathers.<sup>21</sup> However, some countries have consciously designed their leave regimes to encourage fathers to play a more central role in infant care. In the 1970s and 1980s, Sweden and Norway made it possible for fathers to share the family's parental leave allotment; during the 1990s, they and other Nordic countries went further, making a portion usable only by fathers and creating incentives to encourage more equal sharing of parental leave between parents.<sup>22</sup> Some countries in other regions have adopted similar policies,<sup>23</sup> and in 2019 the European Union adopted a directive that calls for all EU member countries to make at least two months of parental leave non-transferable.<sup>24</sup> A handful of countries have replaced pre-existing maternity and paternity leaves with a single "parental" leave.<sup>25</sup> However, even these countries often still assign portions of the parental leave to specific parents. Iceland, for example, now provides a nine-month relatively highly-compensated parental leave, of which three months is available only to mothers, three months to fathers, and three months to either parent.<sup>26</sup>

As discussed in Part IV, designating a portion of parental leave usable only by fathers has shown promise in raising men's usage rates. This is particularly true if the pay level is relatively high and there are adequate protections against employment discrimination. However, in all countries, mothers continue to use the vast majority of parental leave that is not specifically reserved for fathers.<sup>27</sup> Additionally, as noted above, almost all countries also continue to provide statutory maternity leaves that are much

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20. See *id.* at 61; see also, e.g., JANNA VAN BELLE, RAND CORP., PATERNITY AND PARENTAL LEAVE POLICIES ACROSS THE EUROPEAN UNION 8 (2016) (discussing wide range in length and compensation levels under parental leave policies).

21. See *Parental Leave: Where Are the Fathers? Men's Uptake of Parental Leave Is Rising but Still Low*, POLICY BRIEF (OECD, Paris), Mar. 2016, <https://www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf>; ADDATI ET AL., *supra* note 2, at 66-67.

22. See generally Linda Haas & Tine Rostgaard, *Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave*, 14 COMMUNITY, WORK & FAM. 177 (2011); Linda Haas & C. Philip Hwang, *The Impact of Taking Parental Leave on Fathers' Participation in Childcare and Relationships With Children: Lessons from Sweden*, 11 COMMUNITY, WORK & FAM. 85 (2008).

23. See INT'L NETWORK ON LEAVE POLICIES & RES., 15TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2019, at 22 (Sonja Blum et al. eds., 2019).

24. See Art 5, § 2, Directive (EU) 2019/1158 of the European Parliament and Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, 2019 O.J. (L188) 79. This directive repealed an earlier directive issued in 2010 that had required that one month of parental leave be non-transferable.

25. A leading annual compendium of leave policies around the world (which is somewhat less comprehensive than the ILO report) identifies just six countries, including Australia, as having only "parental" leaves. See INT'L NETWORK ON LEAVE POLICIES & RES., *supra* note 23, at 20. Because the report focuses on federal policies, the United States is characterized as lacking a policy entirely.

26. See *id.* at 256-60.

27. See sources cited *supra* note 21.

longer than paternity leaves, in addition to any gender-neutral parental leaves. The United States and Australia are thus truly unusual in that their new laws eschew sex-specific leaves entirely, in favor of simply providing parental leave.

## II. GENDER-NEUTRAL PARENTAL LEAVE POLICIES ENACTED IN THE UNITED STATES AND AUSTRALIA

The United States and Australia's leave policies are notable for their gender-neutral structure, but neither country is an international leader in terms of the overall generosity of the leave regime. Both are Anglophone countries with broadly similar liberal welfare regimes, a larger grouping that is often used in welfare state comparative analysis.<sup>28</sup> Liberal welfare regimes conceptualize responsibility for family-wellbeing as a private responsibility rather than government responsibility; they generally provide relatively low levels of public benefits and limited regulation of private businesses.<sup>29</sup> Even now that the countries provide economic support to new parents, the duration of benefits is still relatively short. The laws in the U.S. states differ, but they offer each parent benefits ranging from four to twelve weeks, and Australia provides families collectively a total of twenty weeks of benefits. By contrast, the OECD average is over sixty weeks, and some developed economies offer multiples *years* of paid parental leave.<sup>30</sup>

The gender-neutral structure adopted in these countries is probably partially a by-product of how late they were to adopt *any* kind of paid leave. The policies were designed after many other countries had supplemented maternity leave with paternity and parental leaves. Also, the new laws were enacted after advocacy for marriage and parenting rights for same-sex couples had gained prominence, and their gender-neutral structure facilitates use by gay and lesbian couples.<sup>31</sup> That said, they reflect distinctly different expectations around how parenting roles will—or should—be shared within families. This Part describes the structure of the new benefits laws adopted in each country, as well as the countries' pre-existing unpaid leave laws. The

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28. See, e.g., Marian Baird & Margaret O'Brien, *Dynamics of Parental Leave in Anglophone Countries: The Paradox of State Expansion in Liberal Welfare Regimes*, 18 COMMUNITY, WORK & FAM. 198, 199 (2015).

29. See *id.* at 200.

30. See AMERICAN ENTERPRISE INSTITUTE, AEI-BROOKINGS WORKING GROUP ON PAID FAMILY LEAVE, PAID FAMILY AND MEDICAL LEAVE: AN ISSUE WHOSE TIME HAS COME 16 (May 2017), [https://www.brookings.edu/wp-content/uploads/2017/06/es\\_20170606\\_paidfamilyleave.pdf](https://www.brookings.edu/wp-content/uploads/2017/06/es_20170606_paidfamilyleave.pdf).

31. Some countries with designated maternity and paternity leaves have made modifications to allow same-sex couples equal access to benefits. Cf., WORLD POLICY ANALYSIS CENTER, PAID PARENTAL LEAVE: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES 19 (2018), [https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Parental%20Leave%20OECD%20Country%20Approaches\\_0.pdf](https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Parental%20Leave%20OECD%20Country%20Approaches_0.pdf).

next Part explains the historical antecedents of the current laws and the contrasting understanding of “equality” they embody.

#### *A. American States’ Laws*

Although the United States lacks a federal law guaranteeing paid parental leave to workers generally, a growing number of U.S. states have enacted their own paid leave laws. As of April 2021, nine U.S. states (California, Colorado, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington state), as well as Washington, D.C., have enacted laws that provide benefits to parents taking time off work with a new child.<sup>32</sup> Additionally, in December 2019, Congress passed a law that provides paid leave to most federal civilian workers.<sup>33</sup> Because several of the states that have enacted laws are very populous, they account for more than a quarter of the U.S. population.<sup>34</sup> Indeed, some have economies and populations that are larger than most countries. For example, if California were a country, it would have the world’s fifth largest economy<sup>35</sup> and thirty-fourth largest population (40 million).<sup>36</sup> Australia, by comparison, has the world’s fourteenth largest economy<sup>37</sup> and fifty-sixth largest population (23 million).<sup>38</sup>

The basic model enacted in all of the U.S. states is relatively uniform and, as discussed below, it is quite similar to the Family and Medical Leave Act (FMLA), a federal law that provides unpaid leave.<sup>39</sup> The laws provide each parent an independent, equal, and non-transferable right to claim benefits for time off work after the birth, adoption, or foster placement of a child. This is typically called bonding leave. It can be claimed by both members of a same-sex couple, so long as each has a parental relationship to

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32. See *supra* note 4. For detailed descriptions of the scope of each of these laws, see A BETTER BALANCE, OVERVIEW OF PAID FAMILY & MEDICAL LEAVE LAWS IN THE UNITED STATES (2020) <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/> (visited Nov. 18, 2020).

33. Federal Employee Paid Leave Act, Pub. L. No. 116-92, §§ 1121–, 133 Stat. 1198 (2019). Benefits became available for births, adoptions, or foster placements occurring after October 1, 2020. See Office of Personnel, 5 CFR Part 630, RIN: 3206-AN96, *Paid Parental Leave* (interim final rule), available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-14832.pdf>.

34. See *US States – Ranked by Population 2019* (2020), WORLDPOPULATIONREVIEW.COM, <http://worldpopulationreview.com/states/> (last visited Jun. 21, 2020) (calculations available upon request).

35. Associated Press, *California is now the world’s fifth-largest economy, surpassing United Kingdom*, L.A. TIMES (May 4, 2018), <https://www.latimes.com/business/la-fi-california-economy-gdp-20180504-story.html>.

36. Tim Fang, *California Population on Verge of 40 Million People*, CBS SF BAY AREA (May 1, 2018), <https://sanfrancisco.cbslocal.com/2018/05/01/california-population-on-verge-of-40-million-people/>.

37. See *GDP Ranked by Country 2019* (2020), WORLDPOPULATIONREVIEW.COM, <http://worldpopulationreview.com/countries/countries-by-gdp/> (visited July 24, 2019).

38. See CENT. INTELLIGENCE AGENCY (C.I.A.), *The World Factbook. Country Comparison: Population*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (visited July 24, 2019).

39. 29 U.S.C. §§ 2601–. (2018).



the child. The bonding benefits are part of a more general benefit scheme, which also provides benefits for time an employee takes off work to care for a close family member with a serious health condition or to address his or her own serious health condition. These laws are generally referred to as “paid family and medical leave” or “paid family leave” laws.<sup>40</sup>

The maximum period of bonding benefits ranges considerably, with the newer laws providing more generous benefits.<sup>41</sup> California’s law, enacted in 2002, originally provided six weeks of bonding benefits to each parent; it was amended in 2019 to lengthen the benefit period to eight weeks. Rhode Island’s law, enacted in 2013, provides just four weeks to each parent. But laws enacted more recently in Colorado, Connecticut, Massachusetts, Oregon, New York, and Washington state, as well as amendments to a pre-existing law in New Jersey, provide each parent twelve weeks of benefits. Likewise, under the federal policy, each parent receives twelve weeks of paid leave.

Under all of these laws, the bonding benefits are an *individual* right of each parent, not a shared familial right. Additionally, because these laws also provide benefits for time off work for medical conditions, birth mothers (and other birth parents) generally can receive additional benefits for time spent physically recovering from pregnancy and childbirth.<sup>42</sup> For a standard vaginal birth, this is typically assumed to be six weeks; a longer duration of medical benefits may be available if the pregnancy or the birth had medical complications. In other words, in many of the states, a birth mother would expect to receive at least eighteen weeks of benefits, with six weeks being medical benefits and then twelve weeks being bonding benefits.<sup>43</sup> The father (or another second parent of the child) would receive his own, separate twelve weeks of bonding benefits.

The laws do not specify that benefits can only be claimed by a “primary” caregiver, and parents generally may receive the benefits simultaneously, sequentially, or intermittently. This provides flexibility to families in how they handle post-birth care. For example, under one of the newer state laws, a birth mother might receive benefits for eighteen weeks after the birth (medical benefits and then bonding benefits), while the father claimed two weeks of bonding benefits immediately after birth, simultaneous to the mother, and then ten weeks of bonding benefits after the mother exhausted

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40. See, e.g., A BETTER BALANCE, *supra* note 32..

41. For more detail, and cites to the specific legislation, see *id.*

42. See *id.* (describing state laws). The federal worker policy only addresses bonding with a new child. However, federal employees receive relatively generous amounts of sick leave that can be used by birth mothers for medical needs. See Office of Personnel Management, *Fact Sheet: Sick Leave (General Information)*, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/sick-leave-general-information/>. The vast majority of persons who give birth are cisgender women. Accordingly, the text refers to birth parents as “mothers”. However, the laws are not gender-specific. A transman or nonbinary person who gave birth would also qualify for the medical benefits.

43. See A BETTER BALANCE, *supra* note 32.

her benefits. A different family might choose to have both parents claim benefits simultaneously throughout, perhaps to assist with care for older siblings as well as the newborn baby. And yet a different family might choose to have no overlap in benefits at all, thus extending the total time the baby is cared for by a parent. A weakness of the U.S. laws, which I discuss elsewhere, is that they fail to make any adjustments for single-parent families.<sup>44</sup>

To be eligible for benefits under these laws, employees need to have a pre-existing connection to the paid labor market.<sup>45</sup> The state paid benefits laws generally cover all, or almost all, private-sector employees, whether they work full-time or part-time. Many also allow self-employed workers to opt-in, and some cover public employees. Most are funded through a payroll tax on employees, but in some states employers also contribute. Employees receive between 60 and 100% of their regular wages, up to caps which currently range from \$750 US (about \$1050 AUD) to \$1250 US (about \$1750 AUD) per week.<sup>46</sup> Employers generally can choose to top-up payments to the employee's regular wages.

Many of the state laws guarantee that workers are entitled to return to their jobs after bonding leave, but a few do not.<sup>47</sup> (In this sense, despite their name, some are technically "benefits" laws rather than "leave" laws.) In states that do not provide job-guaranteed leave, employees may claim benefits in conjunction with leave available under other laws or policies. The federal FMLA provides new mothers and fathers twelve weeks of unpaid leave after the birth or adoption of a child. However, the FMLA only applies to employers with at least fifty employees, and to employees who have worked for the prior employer for at least a year, and at least 1250 hours in that time (an average of about twenty-five hours/week).<sup>48</sup> Collectively, these requirements exclude about 40% of the private workforce.<sup>49</sup> This means that in some states, a birth mother might be eligible for eighteen weeks of benefits (medical benefits plus bonding benefits) but only twelve weeks of job-protective leave, or even no job-protected leave, if she is not covered by the FMLA or a comparable state law or employment policy.

Of course, individual companies may provide more generous paid leave than the law requires, simply as a matter of discretionary policy, or as a result of collective or individual bargaining. However, in the United States, this is

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44. See Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. (forthcoming 2021) (Ind. Legal Stud. Res., Paper No. 3587979), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3587979](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587979).

45. See A BETTER BALANCE, *supra* note 32.

46. See *id.* Most caps will be adjusted automatically if the state's median weekly wage rises.

47. See *id.* (indicating Rhode Island, New York, Massachusetts, Connecticut, and Oregon provide job-protected leave to most or all employees taking bonding leave; Washington provides more limited leave rights).

48. See 29 U.S.C. § 2611(2), (4) (2018).

49. See U.S. DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 21 (2013), <https://www.dol.gov/asp/evaluation/fmla/fmla-2012-technical-report.pdf>.

relatively rare. Only about 19% of employees receive paid maternity, paternity, parental or family leave as an employment benefit; among the lowest quartile of wage-earners, the figure is just 9%.<sup>50</sup> Even where offered, it often provides employees no more than a month of leave.<sup>51</sup> Employers that provide this benefit often offer equal amounts of time to both parents; as discussed more fully below, this is generally required by American antidiscrimination law.<sup>52</sup> A somewhat larger share of employees, 40%, receive benefits for the time they cannot work because of non-permanent health conditions.<sup>53</sup> These benefits, typically known as short-term disability benefits, may provide partial income replacement for birth mothers recovering from the physical effects of childbirth. Although workers usually have some more general paid personal or vacation leave, this typically would provide at most a few weeks of salary replacement.<sup>54</sup>

In summary, recently-enacted U.S. state laws offer parents equal and non-transferable benefits for a period of bonding, ranging from four weeks to twelve weeks, with a new baby. Birth mothers may receive additional benefits for medical recovery. The federal FMLA, likewise, treats parents identically, providing eligible employees twelve weeks of unpaid parental leave. The Australian structure is very different.

### *B. Australia's Laws*

Australia's national paid parental leave (PPL) program was launched in 2011. It provides up to eighteen weeks of benefits to the person who is designated as the primary caregiver, known in Australian law as the "primary

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50. BUREAU OF LABOR STATISTICS (BLS), NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES 119–120, tbl.31 (2019), <https://www.bls.gov/ncs/ebs/benefits/2019/ownership/civilian/table31a.pdf> [hereinafter BLS, *Table 31*]. These figures predate the Coronavirus pandemic of 2020. In response to this crisis, some employers expanded their leave policies; Congress also passed some short-term expansions on paid family leave mandates, which are, as of this writing, due to expire December 2020.

51. See, e.g., WORLDATWORK, SURVEY OF PAID PARENTAL LEAVE IN THE UNITED STATES 17 (2017), available at <https://www.worldatwork.org/docs/research-and-surveys/survey-report-survey-of-paid-parental-leave-in-the-us.pdf> (employer survey reporting mean of 4.1 weeks and a median of 3 weeks).

52. See *infra* text accompanying notes 84–85. Some of these employers may offer extra paid time off to birth mothers for medical recovery, either as part of a maternity leave or as short-term disability benefits.

53. See BLS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES 59–60, tbl.16 (2019), <https://www.bls.gov/ncs/ebs/benefits/2019/ownership/civilian/table16a.pdf> (reporting 47% of full-time and 17% of part-time workers receive short-term disability benefits).

54. BLS, *Table 31*, *supra* note 50 (reporting that 87% of full-time and 41% of part-time workers receive paid vacation days); *id.* at 131–132, tbl. 34, *Table 34, Paid sick leave: Number of Annual Days by Service Requirement, Civilian Workers* (showing employees with vacation benefits generally receive 9–18 days of vacation); see also, e.g., LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2008, N.P70-128 (2011) (reporting, based on 2008 data, that only 51% of first-time mothers used paid maternity, sick, or vacation leave after the birth, while 22% quit their job and 42% took unpaid leave).

carer,” for a child after a birth or adoption. The “primary carer” is defined as the single person who “meets the child’s physical needs more than anyone else” at the time in question.<sup>55</sup> PPL is awarded on a family basis, not an individual basis. It is usable by either parent, but the default primary carer is the birth mother; if she is not serving as the primary carer, she can transfer some or all of the weeks of benefits to the father or other primary carer.<sup>56</sup> PPL benefits must be taken in a single block of time. They cannot be used on an intermittent or part-time basis.<sup>57</sup>

Two years after the PPL program was put in place, Australia augmented the program by providing two weeks of “Dad and Partner Pay” (DAPP) that may be claimed by “secondary” carers.<sup>58</sup> Despite its name, DAPP is gender-neutral, in that it can be claimed by a woman as well as a man who is a partner of a primary carer. A father or other secondary carer may claim DAPP benefits at the same time as the mother or other primary carer claims PPL benefits.<sup>59</sup> However, only one person may be designated as the primary carer at any given time. Both PPL and DAPP benefits must be used within a year of the birth or adoption.

To be eligible to receive PPL or DAPP, an employee must have engaged in at least some paid work in the prior year; however, the threshold to qualify is quite modest. Part-time or casual work generally suffices, as does self-employment.<sup>60</sup> PPL and DAPP benefits are paid at a flat rate based on the Australian national minimum wage; as of 2020, parents receive approximately \$750 AU / week (about \$530 US).<sup>61</sup> An employer may choose to top-up these payments to the regular rate of pay. Very high earners (individual taxable incomes above \$150,000 AU) are ineligible for PPL payments.<sup>62</sup>

The PPL regime offers partial income replacement during time off work, but the legislation does not guarantee the maintenance of a job. Most Australian employees, however, have far more generous unpaid leave rights than are typical in the United States. A federal law, the Fair Work Act of

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55. *Paid Parental Leave Act 2010* (Cth) ch 2 (Austl.); for the government’s summary of eligibility requirements, see Dep’t of Human Services, Australian Government, *Parental Leave Pay* (22 Oct. 2018), <<https://www.humanservices.gov.au/individuals/services/centrelink/parental-leave-pay>> (visited Dec. 17, 2018).

56. *Paid Parental Leave Act 2010* (Cth) ch 2 pt 2–3 div 6 (Austl.).

57. Employees receiving PPL may be paid for a small number of “keep in touch” days, designed to facilitate ongoing connection with the employer during an extended period of leave. *Id.* at ch 2 pt 2–3 div 7 s 50.

58. *See id.* ch 3A.

59. *See id.* at ch 3A pt 3A–3 div 6.

60. *See id.* at ch 2 pt 2–3 div 3.

61. *See* Australian Gov’t, Dep’t of Human Services, *Parental Leave Pay: How Much You Can Receive*, <<https://www.humanservices.gov.au/individuals/services/centrelink/parental-leave-pay/payment-rates/how-much-you-can-receive>> (visited Nov. 18, 2020).

62. *See Paid Parental Leave Act 2010* (Cth) ch 2 pt 2–2 div 6 (Austl.). Beginning July 1, 2020, this amount will be indexed. *See id.*

2009 (FWA), provides each parent a year of unpaid parental leave after the birth or adoption of a child.<sup>63</sup> To be eligible, the employee must have worked for the employer for at least one year prior to taking leave. Other than this limitation, the FWA has broad coverage. It applies to small as well as large employers, and the parental leave provisions apply to both full and part-time employees, as well as many non-permanent employees known as “casual” workers in Australian labor law.<sup>64</sup>

Under the FWA, both mothers and fathers are eligible to take unpaid leave. If both take leave, they may take up to eight weeks concurrently; otherwise, one parent’s leave starts when the other parent’s leave concludes, and, in most instances, the mother must take leave immediately after the birth.<sup>65</sup> If only one parent takes leave, she or he can ask to extend the parental leave for an additional twelve months.<sup>66</sup> This provision is typically used by women to extend leaves if their partners forego claims to unpaid parental leave.

As in America, Australian employers sometimes provide paid leave to new parents as an employment benefit that goes beyond the government’s mandate. This may be pursuant to collective bargaining agreements, general workplace policies, or employment contracts. Among employers with at least 100 employees, just over half (52%) provide maternity or primary carer leave, and 46% offer paid paternity or secondary carer leave.<sup>67</sup> Like the public PPL program, private policies generally provide primary carers much longer paid leaves than secondary carers (10 weeks on average, as compared to 1.6 weeks).<sup>68</sup> Primary carers can opt to receive employer-provided benefits after they have exhausted the eighteen weeks of government benefits.

In summary, while gender-neutral, the Australian paid parental leave law is premised on the expectation that there will be a single primary carer

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63. See *Fair Work Act 2009* (Cth) ch 2 pt 2-2 div 5 s 67 (Austl.), <<https://www.legislation.gov.au/Details/C2018C00512>>.

64. Casual employees are eligible if they were employed on a “regular or systematic” basis over the previous twelve months and if they would have had a “reasonable expectation of continuing employment” on a “regular or systematic” basis, but for the birth of the child. *Id.*

65. See *id.* at s 72.

66. See *id.*

67. WORKPLACE GENDER EQUAL. AGENCY, AUSTRALIA’S GENDER EQUALITY SCORECARD 11 (Nov. 2020) [hereinafter, WGEA, 2020 SCORECARD], [https://www.wgea.gov.au/sites/default/files/documents/2019-20%20Gender%20Equality%20Scorecard\\_FINAL.pdf](https://www.wgea.gov.au/sites/default/files/documents/2019-20%20Gender%20Equality%20Scorecard_FINAL.pdf). There is significant variation among sectors. For example, WGEA reports 81% of employers in the education and training sector provide primary carer leave, as compared to 24% in the retail trade sector and the accommodation and food services sector. See *id.* at 12.

68. These averages are from the 2017-2018 scorecard. WORKPLACE GENDER EQUAL. AGENCY, AUSTRALIA’S GENDER EQUALITY SCORECARD 11 (2018), <https://www.wgea.gov.au/sites/default/files/documents/2017-18-Gender-Equality-Scorecard-and-Five-Year-Booklet.pdf>. The 2019 and 2020 scorecards do not report averages in the same format. However, the overall statistics are very similar to 2018, and the 2020 report card does report that the most common length of primary carer’s leave is within the 7–12 week range. See WGEA, 2020 SCORECARD 11, *supra* note 67.

for a new baby, and that the secondary carer will take only a very short amount of time off work around the birth. Private employer policies are generally structured the same way. The public and private paid benefits work in conjunction with pre-existing unpaid leave rights that allow a new parent to take at least a full year off work, providing at least partial income replacement for several months of leave.

### III. COMPETING CONCEPTIONS OF EQUALITY IN THE CONTEXT OF PREGNANCY AND CHILDBIRTH

Parental leave laws implicate a foundational question in sex discrimination theory and doctrine, famously characterized by American law professor and advocate Wendy Williams as “equality’s riddle.”<sup>69</sup> Women generally can become pregnant, give birth, and breastfeed; men generally cannot. (Transmen and non-binary persons may also become pregnant, give birth and breastfeed; however, the foundational sex discrimination doctrine discussed below emerged before there was significant consideration of this possibility.) These physical differences are accompanied by social differences; even though many aspects of newborn care *can* be done by men, in most societies, women have generally borne primary responsibility for babies and young children. Given this combination of biological and social factors, some advocates and theorists contend women’s equality is best served by providing sex-specific supports, such as accommodations during pregnancy and maternity leave. They argue that this facilitates women’s long-term connection to the workplace, while also protecting the health of new mothers and babies and making it possible for women to play their traditional role in family life. Others suggest that such “special” treatment reifies assumptions that women will prioritize family over work, and that it may spur workplace discrimination against women of childbearing age. They argue instead that any support for new parents must be on a gender-neutral basis and that pregnancy should be addressed like any other health condition. Ultimately, U.S. courts, agencies, and lawmakers primarily endorsed the latter approach; Australian courts, agencies, and lawmakers primarily endorsed the former. This Part shows how this history continues to shape the countries’ leave regimes, even though both are now nominally gender-neutral.

#### *A. United States: Same Treatment Approach*

While the United States was late, as compared to other countries, to enact job-protected leave for parents, it was quite early to enact legislation prohibiting workplace discrimination. Accordingly, the first piece of federal

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69. Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment / Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

legislation addressing employment issues faced by women in connection with pregnancy and childbirth was anti-discrimination law, not leave legislation. This history helped shape how later leave laws developed.

The landmark 1964 Civil Rights Act sought to end discrimination in many aspects of public and private life; Title VII of the law addresses discrimination in employment.<sup>70</sup> Although the primary impetus for the law was racial segregation and discrimination, Title VII also makes it illegal to discriminate on the basis of sex.<sup>71</sup> Under the law, employers are generally prohibited from distinguishing among employees based on any of the enumerated factors.<sup>72</sup> Initially, the federal agency charged with implementing the law was not sure how this same-treatment standard should apply to pregnancy. In its first report to Congress, it stated:

In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment. . . . The pregnant female, however, has no analogous male counterpart and pregnancy must necessarily be treated uniquely.<sup>73</sup>

Early lawsuits raised two distinct questions. The first was whether treating pregnant women *less well* than other employees—e.g., firing employees when they became pregnant, or excluding pregnancy from health or disability policies—discriminated on the basis of sex? The second was whether treating pregnant women *better* than other employees—e.g., providing maternity leave but not a more general disability leave—discriminated on the basis of sex, by disadvantaging men?

In 1976, the United States Supreme Court addressed the first question. In a case called *General Electric Company v. Gilbert*, it held that it was permissible to treat pregnancy less favorably than other health conditions.<sup>74</sup> The Court, building on an earlier case assessing the legality of this kind of policy under the Equal Protection Clause,<sup>75</sup> reasoned such policies distinguished between “pregnant persons” and “nonpregnant persons,” rather than on the basis of sex explicitly (in that the category of “non-pregnant persons” included both men and women), and thus did not violate the law.<sup>76</sup> This decision was immediately unpopular. In 1978, the U.S. Congress passed

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70. Pub. L. 88-852, 78 Stat. 241 (1964).

71. See 42 U.S.C. § 2000e-2a (2018) (prohibiting discrimination by employers on the basis of race, color, sex, national origin, and religion). Deborah A. Widiss, Gilbert Redux: *The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 978-98 (2013).

72. Title VII prohibits both direct and indirect discrimination, or what is known in the United States as “disparate impact.” See 42 U.S.C. § 2000e-2(k) (2018); *Griggs v. Duke Power*, 401 U.S. 424 (1971). However, U.S. courts have generally been resistant to claims premised on the idea that inadequate support for pregnancy or parenting disparately affects women. See generally sources cited in Widiss, *supra* note 71, at 1020 n.264.

73. U.S. EQUAL EMP. OPPORTUNITY COMM’N, FIRST ANNUAL REPORT TO CONGRESS (1967).

74. 429 U.S. 125 (1976).

75. See *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974).

76. *id.* at 135-36.

the Pregnancy Discrimination Act (PDA), which superseded the Court's decision in *Gilbert* by amending the civil rights law to explicitly define pregnancy discrimination as a form of sex discrimination. It also provides that women affected by pregnancy "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."<sup>77</sup>

The wording of the PDA led to litigation over the second question—could women receive special support for pregnancy or childbirth? This issue was particularly pressing because, at about the same time as Congress passed the PDA, some U.S. states passed laws that mandated maternity leaves. Employers argued that the state laws could not be reconciled with the federal law's mandate that pregnancy be treated "the same" as other health conditions, and that the federal law should therefore control. This question reached the U.S. Supreme Court in a case called *California Federal Savings and Loan Assoc. v. Guerra* (commonly known as "*Cal Fed*"), which challenged a California law requiring employers to provide up to four months of unpaid "pregnancy disability" leave.<sup>78</sup>

Leading women's rights and feminists organizations were divided as to which side to support in the *Cal Fed* case.<sup>79</sup> Some contended that California's law was permissible. Others thought the California law violated the federal law but suggested that the remedy should be requiring a general disability leave that was comparable to the mandated maternity leave. Ultimately, the Supreme Court held the maternity-specific law was permissible because it was intended to achieve the same *purpose* as the federal law—making it possible for "women, as well as men, to have families without losing their jobs."<sup>80</sup>

While this litigation was progressing in the lower courts, advocates began working on a federal law that would address new parents' need for job-protected leave.<sup>81</sup> The leaders of the effort, firmly in the "same treatment" camp, rejected proposals to provide a specific maternity leave. They feared that requiring employers to provide maternity leave would spur discrimination against women. Also, to the extent that any such mandate relied on sex-based stereotypes regarding appropriate roles for women versus men, it might have been held to violate the constitutional guarantee of equal protection or Title VII.<sup>82</sup>

The advocates leading the lobbying campaign advocated instead for a gender-neutral leave available to *either* parent, as part of a more general right

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77. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e-(k) (2018)).

78. 479 U.S. 272 (1987).

79. See Widiss, *supra* note 71, at 998-1000.

80. *Cal Fed*, 479 U.S. at 289.

81. See Widiss, *supra* note 71, at 1001-02.

82. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (holding unconstitutional Social Security benefits provided to widows but not widowers as improperly premised on the "presumption that



to take time off to address an employee's serious health condition or to provide caretaking for a family member with a serious health condition. These efforts ultimately led to the FMLA. However, employers strenuously opposed the broad range of conditions that could qualify for leave; to secure passage, sponsors had to accept significant exceptions in terms of coverage. As described above, the FMLA does not apply to almost half of the private workforce. At the time the FMLA was being considered in Congress, and since, some advocates and theorists have pointed out that it would have been far easier to pass a law that simply provided maternity leave.<sup>83</sup>

In the decades since the decision in *Cal Fed*, the federal agency that implements American antidiscrimination law has interpreted the decision to allow special maternity protections only when a birth parent is physically affected by pregnancy or childbirth. The agency reasons that this period, generally assumed to be six to eight weeks after a birth, is the only point at which a birth parent are not similarly-situated to a non-birth parent.<sup>84</sup> Beyond that period, the agency interprets the antidiscrimination law to require men and women to receive the same amount of time off, and the same level of compensation, for care related to new babies. Accordingly, American employers typically provide men and women equal amounts of time off for bonding, although birth mothers may receive additional time for recovery from childbirth.<sup>85</sup>

Some might suggest that new mothers who are breastfeeding are also not similarly-situated to men, and thus that longer leaves for breastfeeding women could be permissible. However, the EEOC guidance assumes that breastfeeding women will have returned to work and simply emphasizes that they must receive the "same freedom to address ... lactation-related needs" as other employees have to address "non-incapacitating medical conditions."<sup>86</sup> American wage and hour law provides many employees a right

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women as a group would choose to forgo work to care for children while men would not[.]"). A shorter leave that responded solely to the physical effects of pregnancy and childbirth likely would be permissible under the reasoning of *Geduldig*, 417 U.S. at 494 and *Cal Fed.*, 479 U.S. at 289.

83. See Widiss, *supra* note 71, at 1001-02; see also JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 118 (2010) ("One prominent feminist confided to me in 2006 that women's groups in Washington could have gotten maternity leave a decade before the passage of the [FMLA] in 1993.").

84. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES* Pt. 1.C.3 (2015).

85. See, e.g., *WORLDATEWORK*, *supra* note 51, at 14-15; cf. Gayle Kaufman & Richard J. Petts, *Gendered Parental Leave Policies Among Fortune 500 Companies*, COMM., WORK & FAM. (2020), DOI: 10.1080/13668803.2020.1804324 (finding that most Fortune 500 countries provided birth mothers longer leaves than fathers or adoptive parents, with the difference typically being six-eight weeks).

86. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 84, at Part I.A.4.b.

to unpaid break time in which to express breastmilk, as well as access to a private non-bathroom space in which to do so.<sup>87</sup>

In the United States, some companies adopt a gender-neutral policy structured like Australian policies—that is, with an extended period of leave and benefits for a “primary” caregiver.<sup>88</sup> This approach can be permissible under the statutory and constitutional standards, but only if implemented on a truly even-handed basis. Companies with such policies have faced lawsuits brought by fathers who argue that company personnel generally assume women are primary caregivers while asking men to take steps to prove that they meet this standard. This, the fathers contend, violates anti-discrimination laws, as it relies on sex-based stereotypes and places a burden on men that is not imposed on women. Several high-profile lawsuits have made such claims.<sup>89</sup> Although these cases have generally settled before courts have issued final determinations on the legal issue, employers in the U.S. are typically advised to eschew policies that distinguish between primary and secondary carers. In summary, U.S. paid and unpaid leave law, in conjunction with anti-discrimination laws, generally requires that men and women be treated identically.

### *B. Australia: Special Treatment Approach*

Australia’s conception of what “equality” means in the context of pregnancy and maternity leave is quite different. Australia, like many other countries, created mandatory maternity leaves *before* it enacted federal legislation addressing sex discrimination (albeit after some Australian states had enacted anti-discrimination provisions).<sup>90</sup> And in contrast to American

87. See *id.* at Part III.C (summarizing requirements codified at 29 U.S.C. § 207(r)).

88. See Kaufman & Petts, *supra* note 85, at 10 (finding approximately 8% of Fortune 500 companies structure a parental leave policy in this manner).

89. See, e.g., Samantha Schmidt, *JPMorgan Chase Settles Class-Action Lawsuit After Dad Demands Equal Parental Leave for Men*, WASH. POST (May 30, 2019), [https://www.washingtonpost.com/dc-md-va/2019/05/30/dads-win-settlement-with-jpmorgan-chase-over-parental-leave-policy/?utm\\_term=.78335c95c874](https://www.washingtonpost.com/dc-md-va/2019/05/30/dads-win-settlement-with-jpmorgan-chase-over-parental-leave-policy/?utm_term=.78335c95c874); Brigid Schulte, *CNN Journalist Josh Levs Forced His Employer to Give Dads More Time Off. Now He Wants Others to Speak Up, Too*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/news/inspired-life/wp/2015/06/15/as-a-new-father-cnn-journalist-josh-levs-forced-his-employer-to-give-dads-more-time-off-now-he-wants-others-to-speak-up-too/?noredirect=on&utm\\_term=.f25bac18b599](https://www.washingtonpost.com/news/inspired-life/wp/2015/06/15/as-a-new-father-cnn-journalist-josh-levs-forced-his-employer-to-give-dads-more-time-off-now-he-wants-others-to-speak-up-too/?noredirect=on&utm_term=.f25bac18b599); Press Release, U.S. Equal Emp’t Opportunity Comm’r, *Estee Lauder Companies to Pay \$1.1 Million to Settle EEOC Class Sex Discrimination Lawsuit* (July, 17, 2018), <https://www.eeoc.gov/newsroom/estee-lauder-companies-pay-11-million-settle-eeoc-class-sex-discrimination-lawsuit>.

90. Some of the pre-existing state laws were interpreted to prohibit pregnancy discrimination while others permitted it, but, at least by 1990, all provided that privileges granted to women in connection with pregnancy or childbirth did not constitute discrimination against other employees. See Consie Larmour, ‘Sex Discrimination Legislation in Australia’ (Parliamentary Research Paper No 19, Parliamentary Library, Parliament of Australia, 1990) 39–41.

law, Australian antidiscrimination protections explicitly allow such supports for new mothers as justified by substantive equality principles.

As described in Part II, Australia's paid parental leave program has been gender-neutral since its inception. The country's *unpaid* leave rights, however, were initially limited to women. The genesis of the current unpaid leave rights, now codified in the Fair Work Act, was a 1979 test case brought through the arbitration process that structures industrial relations in Australia.<sup>91</sup> That case explicitly sought maternity leave, not parental leave. Ultimately, the Australian Conciliation and Arbitration Commission mandated that all industrial awards—which set the terms and conditions for many aspects of Australian employment—had to grant new mothers fifty-two weeks of leave, with six weeks being compulsory.

The Commission justified its decision by pointing to the International Labour Organization convention on maternity leave, discussed in Part I, and a separate convention on the employment of women with family responsibilities, even though Australia had not yet formally ratified them. It held that maternity leave responded to “‘female employees’ . . . special industrial interests” in having an opportunity to combine motherhood with continued participation in the workforce.<sup>92</sup>

Five years later, in 1984, Australia enacted the federal Sex Discrimination Act.<sup>93</sup> The law is structured to avoid the interpretative puzzles that gave rise to the *Gilbert* and *Cal Fed* cases in the United States. Rather, the law (like legislation in the United Kingdom on which it was modeled) addresses both questions in a way that is protective of pregnant women. First, pregnancy discrimination is explicitly defined as a form of sex discrimination.<sup>94</sup> Second, the law specifies that it is *not* unlawful to “discriminate against a man” by providing women “rights or privileges in connection with pregnancy, childbirth, or breastfeeding.”<sup>95</sup>

In 1990, the Arbitration Commission addressed how the pre-existing maternity leave rights interacted with the Sex Discrimination Act. This was in response to an industrial relations case seeking leave rights for fathers.<sup>96</sup> The unions bringing the case, and government actors supporting them, relied

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91. See *Maternity Leave Case* (1979) 218 CAR 120, 125 (Austl.), [https://www.fwc.gov.au/documents/documents/education/resources/1979\\_218\\_car\\_120.pdf](https://www.fwc.gov.au/documents/documents/education/resources/1979_218_car_120.pdf). For a fuller discussion of the Australian Industrial Relations system, and the test cases that helped establish the modern parental leave rights, see Marian Baird, *Parental Leave in Australia: The Role of the Industrial Relations System*, 23 L. CONTEXT: A SOCIO-LEGAL J. 45 (2005).

92. *Maternity Leave Case*, 218 CAR at 123.

93. *Sex Discrimination Act 1984* (Cth) (Austl.).

94. *Id.* at s 7.

95. *Id.* at s 31. A more general provision also exempts acts done in compliance with industrial instruments or agreements, thus further protecting the maternity-specific leave policy implemented by the *Maternity Leave Case*. See *id.* at s 40.

96. *Parental Leave Case, The Federated Miscellaneous Workers Union of Australia v. Angus Nugent & Son Pty. Ltd.* (1990) 32 AIR (Austl.), [https://www.fwc.gov.au/documents/documents/education/resources/1990\\_printj3596.pdf](https://www.fwc.gov.au/documents/documents/education/resources/1990_printj3596.pdf).

primarily on policy arguments rather than discrimination claims. They argued providing paternity leave or parental leave would be appropriate because female participation in the paid workforce was hampered by an “unequal sharing of parental and domestic responsibilities,” and they contended that a growing number of men served as “primary care-givers” for children.<sup>97</sup> They also discussed international trends, noting, as discussed in Part I, that many other developed countries had instituted at least short paternity leaves, and in some cases also supplementary parental leaves that could be used by either parent.<sup>98</sup>

Although the primary parties in the case did not make a sex discrimination argument, some other parties making submissions did. They contended that the availability of maternity leave in the absence of paternity leave constitutes “discrimination against male employees.”<sup>99</sup> The Commission rejected the sex discrimination claim categorically, citing the provisions of the Sex Discrimination Act that specify that “special” provisions could be made for women in connection to pregnancy or childbirth. The Commission characterized these provisions as an appropriate mechanism to achieve a more substantive understanding of equality: “It is our view that under certain conditions discrimination can arise by purporting to treat equally persons whose circumstances are materially different.”<sup>100</sup>

The Commission ultimately held that employers had to provide one week of unpaid paternity leave for all new fathers. This was based on policy considerations rather than any claim related to discrimination. A father who wanted or needed to take on primary responsibility for childcare could receive an “extended” paternity leave of up to fifty-one additional weeks, but the available time would be reduced by any period of maternity leave taken by his spouse.<sup>101</sup> The mother and the father could be on leave simultaneously only during the one week of regular paternity leave. A later decision by the Commission held that parents could be on leave simultaneously for eight weeks.<sup>102</sup>

In 2009, Australia standardized numerous aspects of its labor standards in the statutory Fair Work Act. The FWA supplanted pre-existing tiered structure of unpaid maternity and paternity leaves, created by the decisions discussed above, with a gender-neutral parental leave equally available to either parent. However, it maintains the assumption that there will generally

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97. *Id.* at 4.

98. *Id.* at 5.

99. *Id.* at 8.

100. *Id.*

101. *Id.* at 9.

102. See *Family Provisions Case* (2005) AIRC (Austl.), <https://www.fwc.gov.au/documents/decisionssigned/html/pr082005.htm>.

be a single caregiver for a new baby by limiting parents' ability to be on leave at the same time.

The *paid* parental leave benefits scheme also has explicitly gendered roots. Australian social welfare policy has long included benefits—not linked to work—for new mothers.<sup>103</sup> In the 1990s, the government introduced a plan to enact paid maternity leave, in line with the approach adopted in ILO conventions. It faced criticism, however, that this policy would “discriminate” against women who were not working. The government ultimately passed, instead, a maternity allowance, which was a means-tested benefit available to new mothers regardless of prior work attachment.<sup>104</sup> A few years later the government introduced a new tax refund that became known as the “baby bonus,” which was available to mothers (or potentially fathers) who left the workforce when they had a baby, and a later iteration was available to families with a new baby more generally.<sup>105</sup> By providing new mothers with support that was not premised on prior or subsequent connection to paid work, the policies further inscribed a male breadwinner/female caretaker model.<sup>106</sup>

When the paid parental benefits system was introduced in 2010, primary caretakers who met the work eligibility requirements could choose whether to receive the parental leave payments or the “baby bonus,” but they could not receive both.<sup>107</sup> Thus, the parental leave payments substantively replaced, for many women, these more general social welfare benefits. That said, the social welfare roots of the program persist, to some extent. Parental leave payments are funded by the general budget and administered through the social welfare agency; they are paid at the minimum wage, rather than calibrated to prior earnings; and they retain a means-tested element, although the ceiling is set quite high.<sup>108</sup> Additionally, although they are now nominally gender-neutral, the paid benefits, like the unpaid leave regime, adopt the

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103. See, e.g., Gillian Whitehouse & Michelle Brady, *Parental Leave, Social Inequalities and the Future of Work: Possibilities and Constraints within the Australian Policy Framework*, 29 *LABOUR & INDUSTRY* 257 (2019) (explaining that social welfare benefits for new mothers date back to the 1912 Maternity Allowance).

104. See Deborah Brennan, *Babies, Budgets, and Birthrates: Work/Family Policy in Australia 1996-2006*, 14 *SOC. POL. (INT'L STUD. GENDER, STATE, & SOC'Y)* 31, 41-43 (2007).

105. See *id.*

106. See *id.*; see also, Whitehouse & Brady, *supra* note 103, at 6.

107. See, e.g., BILL MARTIN ET AL., *PAID PARENTAL LEAVE EVALUATION: PHASE 2 REPORT* 52-57 (2013) (analyzing characteristics of mothers who were eligible for parental leave pay but opted to receive the baby bonus instead).

108. See Whitehouse & Brady, *supra* note 103, at 8-10 (describing these characteristics of the program and noting that they have some positive implications in scope of coverage but that they may impede efforts to increase leave-taking by fathers).

model of a single “primary” caregiver for a new baby. The next Part shows this is almost always the mother.

#### IV. GENDERED USE PATTERNS UNDER GENDER-NEUTRAL LAWS

As described in Part II, U.S. state and Australian federal paid leave policies differ from those of almost every other country in that they are fully gender-neutral. Under the U.S. state laws, each parent has an equal and independent, non-transferable right to benefits, ranging from four to twelve weeks, for time spent caring for a new child; under Australian law, each family is entitled to up to eighteen weeks of parental leave benefits for the primary caregiver and two weeks of benefits for a secondary caregiver. Thus, they serve as an interesting test case for two distinctly different ways of structuring a gender-neutral leave.

Early data suggests that men make up a larger share of claimants for parental leave benefits under the American approach than under the Australian approach. This Part presents that data and then draws on the larger parental leave literature to identify structural and contextual factors that may help explain these patterns. It also suggests other factors that should be explored in future research, including how the use of publically-provided benefits interacts with privately-provided benefits and the significance of state-level as compared to federal-level legislation. If the patterns identified here remain consistent, the findings could inform policy development in other countries considering adopting a gender-neutral approach to parental leave, as well as future policy development within the U.S. and Australia. It bears emphasis, however, that there is not necessarily a single “optimal” allocation of parental leave. As Part III explored, there are competing conceptions of what equality for women means in this context.

##### *A. Early Data on Use Patterns in the United States and Australia*

In the states in the U.S. where paid leave laws have been implemented, the proportion of parental bonding benefits claimed by men has generally increased over time. The rate in some states is now relatively close to international leaders like Sweden, Iceland, and Portugal (where men account for about 45% of claimants), and far above the OECD average of 18%.<sup>109</sup> While early, these findings suggest that the U.S. model may be quite effective at encouraging fathers to claim benefits for parental leave.

As described in Part II, as of April 2021, nine states in the U.S. have enacted laws that provide paid benefits to new parents taking time off work to care for a child. Six of these laws were passed so recently that they have

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109. OECD DIRECTORATE OF EMP'T, LABOUR & SOC. AFFAIRS, PARENTS' USE OF CHILDBIRTH-RELATED LEAVE, chart PF2.2.B: Users of Paid Parental Leave (2019), <https://www.oecd.org/els/family/PF2-2-Use-childbirth-leave.pdf>.

not yet been fully phased in, and benefits became available under the new policy for federal workers just in October 2020. Accordingly, this analysis focuses on the three oldest laws. Although these laws differ in the level of income replacement and the duration of benefits, as well as the year of enactment, all share the same basic structure. Each law provides both parents an equal, individual, and non-transferable claim to partial income replacement for time off work in connection with the birth or adoption of a baby, as well as for time off work to care for a family member with a serious health condition or their own serious health condition. The statistics that follow consider only the share of claims made by men relative to women connected with caring for a new child, typically known as “bonding” claims, as this Article focuses specifically on the “parental” leave aspects of the laws.<sup>110</sup>

California’s law went into effect in 2004. In that first year, men accounted for just 15% of bonding claims.<sup>111</sup> By 2019, the most recent year for which data is publicly available, that number had increased to 39%.<sup>112</sup> In 2014, the first year of Rhode Island’s program, men accounted for 32% of bonding claims; five years later, that number had risen to 41%.<sup>113</sup> In New Jersey, men’s claim rate has also increased over time, but from a much lower baseline; in 2010 when the law was first implemented, 11% of claims came from men, and by 2019, that had risen to 20%.<sup>114</sup> New Jersey’s law was amended in 2018 to raise substantially the salary cap and to extend the period of leave permitted. Men’s share of claims rose from 15% (in 2018) to 20% (in 2019); future study should assess whether this trend continues. Obviously, it will also be important to determine what use patterns look like under the more recently-enacted laws. Early evidence is promising, however. New

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110. Advocates for the FMLA, which serves as the model for these state bills, embedded the parental leave right within a more general family and medical leave structure in the hope it would mitigate discrimination against new parents. *See supra* Part III. To the extent their intuition was correct, it may be that including parental leave in a broader “family and medical” leave structure affects gender-based usage patterns. Also, it is important to note that under the state laws, birth mothers may claim benefits for medical recovery from pregnancy or childbirth. Many birth mothers who claim medical benefits *also* claim parental bonding benefits; however, to the extent that some do not, the percentage of men relative to women claiming bonding benefits overstates the actual percentage of men relative to women taking leave in connection with a new baby. However, this may be also true in analysis of parental leave usage in other countries, to the extent they provide a maternity leave separate from a parental leave, and some women might claim only maternity leave.

111. CAL. EMP’T DEV. DEP’T, OVERVIEW OF CALIFORNIA’S PAID FAMILY LEAVE PROGRAM: 2021, [https://www.edd.ca.gov/pdf\\_pub\\_ctr/de2530.pdf](https://www.edd.ca.gov/pdf_pub_ctr/de2530.pdf).

112. *Id.*

113. *Temporary Disability Insurance Program*, TDI ANN. UPDATE (Dep’t Lab. & Training, Rhode Island, R.I.), Dec. 2019, <http://www.dlt.ri.gov/lmi/pdf/tdi/2019.pdf>; *Temporary Disability Insurance Program*, TDI ANN. UPDATE, (Dep’t Lab. & Training, Rhode Island, R.I.), Dec. 2014, <http://www.dlt.ri.gov/lmi/pdf/tdi/2014.pdf>.

114. Author’s calculations based on data from N.J. DEP’T OF LABOR & WORKFORCE DEV., FAMILY LEAVE INSURANCE ANNUAL REPORTS (2014-2019), individual reports available at <https://myleavebenefits.nj.gov/labor/myleavebenefits/about/stats/>.

York released a report showing that in its first year of operation, men accounted for approximately 30% of total bonding claims.<sup>115</sup>

In Australia, use patterns of PPL is quite different. In the first two years of the program, there were 255,000 claims by birth mothers and just 380 transfers to father/partners.<sup>116</sup> By 2016-2017, the rate of transfers increased slightly, but it was still less than one half of one percent.<sup>117</sup> DAPP, by contrast, is claimed almost exclusively by fathers.<sup>118</sup> Based on these statistics, Australia's Workplace Gender Equality Agency issued a report concluding that women claim more than 99% of parental leave benefits and calling for the adoption of strategies to encourage men to claim benefits.<sup>119</sup> While technically correct, the 1% figure is somewhat distorting, as it excludes DAPP entirely. Nonetheless, it is apparent that despite its gender-neutral nature, Australia's parental leave benefits are used almost exclusively by women.

The duration of benefits men receive, and the relative share of leave between fathers and mothers, are also key factors in assessing how leave relates to the allocation of caregiving responsibilities. Again, the available data from the U.S. suggests that a fairly high proportion of male claimants are taking full advantage of the benefits provided, albeit under a baseline that is very short by international standards. Specifically, about 40% of fathers claiming benefits under the law in California receive benefits for all, or very close to all, of the six weeks permitted.<sup>120</sup> In Rhode Island, two-thirds of

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115. N.Y. STATE PAID FAMILY LEAVE, 2018 YEAR IN REVIEW (2018), <https://paidfamilyleave.ny.gov/system/files/documents/2019/08/PFL-EOYReport-2018-v1%207-11-19%20FINAL.pdf>.

116. See Australian Gov't, Dep't of Families, Housing, Community Services and Indigenous Affairs, *Parental Leave Pay – Parent Eligibility*, [https://www.dss.gov.au/sites/default/files/documents/03\\_2013/ppl\\_factsheet\\_2\\_parent\\_eligibility.pdf](https://www.dss.gov.au/sites/default/files/documents/03_2013/ppl_factsheet_2_parent_eligibility.pdf).

117. In 2016-2017, 170,925 mothers started receiving PPL; 738 (0.4%) transferred some or all of the benefits. Data provided to author by personnel at the Department of Social Services, available upon request.

118. See *id.*

119. See WORKPLACE GENDER EQUALITY AGENCY, TOWARDS A GENDER BALANCED PARENTAL LEAVE 9 (2017), <https://www.wgea.gov.au/sites/default/files/documents/Parental-leave-and-gender-equality.pdf>.

120. See Kelly Bedard & Maya Rossin-Slater, *The Economic and Social Impacts of Paid Family Leave in California: Report for the California Employment Development Department*, EMP. DEV. DEP'T 28 (Oct. 13, 2016), 15 & fig.5, [https://www.edd.ca.gov/disability/pdf/PFL\\_Economic\\_and\\_Social\\_Impact\\_Study.pdf](https://www.edd.ca.gov/disability/pdf/PFL_Economic_and_Social_Impact_Study.pdf) (reporting 40% of fathers claiming benefits took the full six weeks). A subsequent study by the same researchers reports 24% of fathers claiming benefits took the full six weeks, with 56% taking less than six weeks and more than two weeks. See Sarah Bana, Kelly Bedard & Maya Rossin-Slater, *Interaction of Gender with Household Decision-making Peer Effects*, 108 AEA PAPERS AND PROC. 388, 389 (2018). In correspondence, the authors explained that these different findings reflected different rounding practices—in the first paper, any leave over 5.5 weeks was rounded up to six weeks—and slightly different sample restrictions. Correspondence available upon request. Both of these studies predated 2019 amendments that extended the total leave available to 8 weeks. A different study concludes that California's paid family leave program extended fathers' average leave by only a few days, though the authors point out this is a large increase over the prior, exceedingly low, baseline; this study considers a sample of all new (employed) fathers, not only those who claimed benefits; also, it was based on births



fathers take the full four weeks permitted.<sup>121</sup> In Australia, by contrast, almost no fathers receive government benefits for more than the two weeks permitted under DAPP, since, as discussed above, parental leave benefits are being used almost exclusively by women.

In summary, early data suggests men claim a greater share of public leave benefits in the U.S. states than in Australia and they claim benefits for a longer duration. Future studies, including regression analysis assessing in more detail how characteristics such as wage level affect claim rates, would be helpful to provide greater context for these findings. Additionally, this data looks only at the relative share of public benefits claims. It does not assess what share of potentially eligible parents claim benefits, how public benefits interact with privately-provided benefits, or whether mothers and fathers are taking leave concurrently or consecutively. Those are likewise important considerations for future study. There is evidence, for example, that Australian fathers claim a slightly higher (though still quite low) percentage of employer-provided primary carer leave than public parental leave.<sup>122</sup> Nonetheless, the initial data suggests a relatively clear picture: parents are more likely to share public benefits for infant caregiving responsibilities under the U.S. model than the Australian model.

### *B. Assessing Factors that May Affect Gendered Use Patterns*

This subpart draws on studies of maternity, paternity, and parental leave in other countries to discuss aspects of the leave regime design that may help explain the early use patterns in the U.S. and Australia, while also identifying additional factors that merit future study. The literature suggests that the most important factor in whether men use leave is whether it is available *only* to fathers.<sup>123</sup> Making individual leave non-transferable, or dedicating a portion of parental leave as usable only by fathers, tend to correlate with higher levels of men's use. These policies are colloquially known as "use-it-or-lose-it" leave or "fathers' quotas." Other important factors include flexibility in the

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that took place between 2000 and 2010, and accordingly pre-dated much of the rise in the rate of men's leave-taking under the law. See Charles L. Baum & Christopher J. Ruhm, *The Effects of Paid Family Leave in California on Labor Market Outcomes*, 35 J. POL'Y ANALYSIS & MGMT. 333 (2016).

121. Data provided to author by Rhode Island Dep't of Lab. and Training; available upon request.

122. See WGEA, 2020 SCORECARD, *supra* note 67, at 11 (reporting women utilize 94% of privately-provided primary carer's leave).

123. See, e.g., Ann-Zofie Duvander & Mats Johansson, *What Are The Effects of Reforms Promoting Fathers' Parental Leave Use?*, 22 J. EUR. SOC. POL'Y 310 (2012); Haas & Rostgaard, *supra* note 22; Peter Moss & Fred Deven, *Leave Policies in Challenging Times: Reviewing the Decade 2004-2014*, 18 J. CMTY., WORK, & FAM. 137 (2015); Ankita Patnaik, *Reserving Time for Daddy: The Consequences of Fathers' Quotas*, 37 J. LAB. ECON. 1009 (2019); Oriel Sullivan et al., *Father-Friendly Policies and Time-Use Data in a Cross-National Context: Potential and Prospects for Future Research*, 624 ANNALS AM. ACAD. POL. & SOC. SCI. 234 (2009).

timing of use, a high pay rate, protection from discrimination, and a supportive workplace culture.<sup>124</sup>

These design elements likely help explain the high rate of male claimants in the United States as compared to Australia. First, in the United States, both leave and benefits are individual and non-transferable. In Australia, by contrast, the basic parental leave payment does not have *any* portion that is usable only by fathers, although DAPP is functionally a two-week use-it-or-lose-it benefit. The U.S. policies also permit greater flexibility in the timing of use, in that they generally allow for sequential, simultaneous, or intermittent use. In Australia, only one parent may claim PLP benefits at any time, and all of the benefits must be taken in an unbroken eighteen-week block. For middle- or high-earners, the pay rate is also higher in the United States than in Australia, as Australian benefits are at the minimum wage, while the U.S. states provide a percentage of regular wages.

Finally, American workers may have more recourse if taking leave results in workplace discrimination. In recent years, litigation in the U.S. concerning discrimination due to family responsibilities, including claims related to parental leave, has increased dramatically.<sup>125</sup> This likely reflects greater willingness to challenge discriminatory practices, rather than a rise in discrimination itself. These cases often result in relatively high verdicts or settlements.<sup>126</sup> Additionally, as noted above, fathers in the U.S. have had some notable successes in challenging a denial of leave.<sup>127</sup> Employers, in turn, are counseled to take steps to decrease discrimination associated with leave in order to reduce their liability risk. A detailed report issued by Australia's Human Rights Commission, by contrast, found shockingly high levels of alleged discrimination against both men and women who took leave but reported that few sought recourse through arbitration or litigation.<sup>128</sup> In part, this may be because the cost-benefit analysis of bringing a lawsuit differs due to very different attorney fee regimes in the two countries.<sup>129</sup>

There are other factors, less discussed in the general literature, that also may contribute to the high percentage of bonding benefits claimed by men in

124. See generally sources cited in note 123.

125. See, e.g., Cynthia Thomas Calvert, *Caregivers in the Workplace*, FAM. RESPONSIBILITIES DISCRIMINATION LITIGATION UPDATE 2016, (U.C. Hastings, WorkLife Law, San Francisco, C.A.), Apr. 2016, at 13–17 & 26, <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf>.

126. See *id.* at 26 (reporting adjusted average individual award or settlement of \$346,639 (US)).

127. See *supra* note 89.

128. AUSTRALIAN HUMAN RIGHTS COMMISSION, SUPPORTING WORKING PARENTS: PREGNANCY AND RETURN TO WORK NATIONAL REVIEW (2014), <https://www.humanrights.gov.au/our-work/sex-discrimination/projects/supporting-working-parents-pregnancy-and-return-work-national>; see also Alexandra Heron & Sara Charlesworth, *Effective Protection of Pregnant Women At Work: Still Waiting for Delivery*, 29 AUST. J. LAB. L. 1 (2016) (discussing low level of success of pregnancy and maternity leave related litigation).

129. Under American anti-discrimination laws, successful plaintiffs generally recover fees, but non-successful plaintiffs are assessed defendants' fees only if the action was frivolous or baseless. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417, 422 (1978). By contrast, in Australia, in state

the U.S. as compared to Australia. The first is structural: *how* a gender-neutral policy identifies eligible parents. Australia's law requires one parent to be identified as the primary caregiver and one as secondary. Given the biological realities of pregnancy, childbirth, and breastfeeding, as well as social norms around care, it not surprising that women are considerably more likely to be designated the primary caregiver. By contrast, U.S. laws do not require designating parents as primary or secondary. Both parents are equally eligible for leave and benefits, simply by virtue of being a parent. In addition to making it easier for both parents to claim benefits, this may operate at a more symbolic level to encourage more equal sharing of responsibilities.

The way relevant government agencies promote and explain public leave policies might also affect use patterns. The state agency websites for the new state laws in the United States feature prominently pictures of fathers with their children, and information pages specifically addressed to fathers, signaling not only that they are eligible for leave but also that it is appropriate and expected for them to take leave.<sup>130</sup> The Australian government website, by contrast, explicitly states that it expects mothers will usually claim the parental leave benefits.<sup>131</sup>

The total length of available leave, both paid and unpaid, may also affect use patterns. Men's usage rates in the United States may be high simply because new mothers are often forced to return to work extremely quickly.<sup>132</sup> As described in Part II, the federal FMLA provides just twelve weeks of unpaid leave to eligible employees. The paid benefits period in California and Rhode Island, the states with particularly high male claim rates, is even shorter.<sup>133</sup> Thus, it may be that fathers claim benefits because their partners go back to work when the infants are still exceptionally young. It will be important to assess whether men in U.S. states continue to claim at high rates as newer laws, which provide a full twelve weeks of bonding leave to each

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jurisdictions, there is usually no award of fees, and in federal claims, a plaintiff who loses may be ordered to pay the defendant's fees. See BETH GAZE & BELINDA SMITH, *EQUALITY AND DISCRIMINATION LAW IN AUSTRALIA: AN INTRODUCTION* 196-99 (2017).

130. For representative pictures, see *Paid Family Leave-Fathers*, EMP. DEV. DEP'T STATE CAL., [https://www.edd.ca.gov/Disability/PFL\\_Fathers.htm](https://www.edd.ca.gov/Disability/PFL_Fathers.htm) (last visited June 3, 2020)); *Paid Family Leave Information for Employees*, N.Y. STATE, <https://paidfamilyleave.ny.gov/employees> (last visited June 3, 2020); *Making Paid Family Leave Work Better for Working Families*, R.I. PAID LEAVE, <http://ripaidleave.net/> (last visited June 3, 2020).

131. See *Paid Parental Leave Scheme*, AUST. GOV'T DEP'T SOC. SERVICES, <https://www.dss.gov.au/our-responsibilities/families-and-children/programmes-services/paid-parental-leave-scheme> (last visited June 3, 2020) ("Parental Leave Pay provides eligible working parents—*usually birth mothers*—with up to 18 weeks of pay at the rate of the national minimum wage.") (emphasis added).

132. Data from 2005–2007 births in the United States shows that 39% of first-time mothers were back to work in less than three months, and 70% were back within three to five months. LAUGHLIN, U.S. CENSUS BUREAU, *supra* note 54. The gradual implementation of paid leave programs will presumably change this pattern to some extent, but women's leaves in the United States will still likely be quite short when compared to international norms.

133. A BETTER BALANCE, *supra* note 32.

parent, as well as additional benefits to birth mothers for medical recovery, are phased in.

In Australia, by contrast, even prior to the implementation of the paid parental leave program, very few women returned to work within three, or even six, months of birth.<sup>134</sup> A formal review of PPL found that it lengthened the duration of leave, while also ultimately increasing the proportion of mothers who returned to paid work within one year of the birth.<sup>135</sup> It had the greatest impact on relatively low-income mothers by making it financially viable for them to utilize a greater portion of the year of unpaid leave already available.

More generally, the structure of a parental leave policy is only one of many factors that shape choices any given family will make about care for infants and young children. Other economic factors and general social norms can likewise play an important role, and, for some families, a desire by the mother to breastfeed may also be an important factor.<sup>136</sup>

Although a full comparison is beyond the scope of this project, America and Australia have generally been relatively similar on several key economic metrics. At least prior to the COVID-19 pandemic, they have had similar maternal employment rates, both of which are lower than in many other developed countries.<sup>137</sup> This may reflect gender wage gaps<sup>138</sup> and that childcare in both countries is relatively expensive, even taking into account public supports.<sup>139</sup> Thus, if one parent is going to reduce or forgo paid employment, it will more often make economic sense for that to be the

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134. See MARTIN ET AL., INS. SOC. SCI. RES., PAID PARENTAL LEAVE EVALUATION: FINAL REPORT 33 (2015) (even pre-PPL only 16% of mothers were back at work three months after the birth, a number that dropped to just 8% after the PPL was phased in).

135. See *id.* at 5 & 96.

136. Somewhat surprisingly, American and Australian women breastfeeding rates are relatively similar. Compare NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. CTR. FOR DISEASE CONTROL, BREASTFEEDING REPORT CARD 5 (2014) (six months after birth, 19% exclusive and 49% doing some breastfeeding) with AUSTL. INST. HEALTH & WELFARE, 2010 AUSTRALIAN NATIONAL INFANT FEEDING SURVEY: INDICATOR RESULTS, 7-9 tbls.2.1-2.2 (2010) (five months after birth, 15% of mothers exclusively breastfeeding and 60% doing some breastfeeding).

137. See OECD DIRECTORATE OF EMP'T, LABOUR & SOC. AFFAIRS, LMF1.2: MATERNAL EMPLOYMENT RATES (Sept. 26, 2016) [http://www.oecd.org/els/family/LMF\\_1\\_2\\_Maternal\\_Employment.pdf](http://www.oecd.org/els/family/LMF_1_2_Maternal_Employment.pdf) (reporting maternal employment in the United States as 65.7% and Australia as 62.9%, while several OECD countries have maternal employment rates of 75% or higher).

138. See *Gender Wage Gap*, OECD DATA, <https://data.oecd.org/earnwage/gender-wage-gap.htm> (last visited June 3, 2020) (reporting Australia's gender wage gap as 11.7% and the United States' as 18.9%). While Australia's reported wage gap is lower than the OECD average is 13.2%, this calculation is based on full-time wages. As discussed below, the majority of Australian mothers work part-time, meaning in practice the wage gap is considerably larger than the full-time figure suggests.

139. See OECD DIRECTORATE OF EMP'T, LABOUR & SOC. AFFAIRS, CHILDCARE SUPPORT, chart PF3.4.B (Aug. 27, 2017), [http://www.oecd.org/els/soc/PF3\\_4\\_Childcare\\_support.pdf](http://www.oecd.org/els/soc/PF3_4_Childcare_support.pdf) (showing net childcare costs for two-earner two-child family in both Australia and the United States are well above the OECD average). Australia provides more subsidy for childcare costs of single parents. See *id.* chart PF3.4.C.

mother. That said, in both countries, about 14% of women out-earn their husbands, meaning that is not always the case.<sup>140</sup>

More striking differences between the countries emerge when considering social norms around caregiving. There is much greater support in the United States than in Australia for the idea that mothers “should” work full-time, even when their children are young.<sup>141</sup> Actual employment practices follow—or perhaps shape—these normative expectations. Again, prior to the pandemic, in the United States, 43% of women with a child one year of age worked full time, and only 17% worked part-time (with the remaining 40% either unemployed or not working).<sup>142</sup> In Australia, by contrast, only 14% of mothers of a one-year-old worked full-time, while 36% worked part-time, and a full half are either on an extended leave or not working.<sup>143</sup> This choice is facilitated by the fact that Australia provides workers a right to request workplace modifications to facilitate the care of children, including part-time work.<sup>144</sup> Additionally, in Australia, part-time workers receive comparable benefits to full-time workers.<sup>145</sup> By contrast, in the United States, part-time work tends to be less available, and it carries additional “costs,” beyond reduced wages, in terms of loss of benefits such as health insurance.

The distinctly different work patterns *after* parental leave likely affect choices families make regarding parental leave itself. In the United States, when a new mother takes leave, she is generally expecting to be out of work no more than three months and then return to work full-time. The same is true for a father who takes leave. In Australia, by contrast, the eighteen weeks of government parental leave benefits are typically used by mothers to provide economic support during leave that is at least six months long; many mothers will seek to stretch it to the full year permitted by the Fair Work Act. Moreover, mothers who return to work are likely to do so on a part-time basis.

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140. See *The American Family Today*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS (Dec. 17, 2015), <http://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/>; ANNABEL CRABB, *THE WIFE DROUGHT* 230 (2013) (citing 2011 data regarding relative spousal earnings in Australia).

141. General population polls conducted in both countries asked whether a woman “should” work full-time, as compared to part-time or no paid work, when her child is under school age? See TOM SMITH ET AL., U.S. GENERAL SOCIAL SURVEY, 2012, <https://gss.norc.umd.edu/> (13% of American respondents agree); BETSY BLUNSDON, AUSTRALIAN SURVEY OF SOCIAL ATTITUDES, 2012 (2017), <https://dataverse.ada.edu.au/dataset.xhtml?persistentId=doi:10.4225/87/ABC2NB> (2.8% of Australian respondents agree). When asked about mothers of *school-aged children*, 44% of respondents in the U.S. say women should work full-time, as compared to 22% of Australian respondents. See *id.*

142. U.S. BUREAU OF LAB. STATISTICS, *EMPLOYMENT CHARACTERISTICS OF FAMILIES – 2018*, tbl. 6, <https://www.bls.gov/news.release/famee.htm>.

143. JENNIFER BAXTER, AUSTRALIAN INST. FAM. STUD., *PARENTS WORKING OUT WORK* (2013).

144. See *Fair Work Act 2009* (Cth) ch 2 pt 2-2 div 5 s 65 (Austl.), <https://www.legislation.gov.au/Details/C2018C00512>.

145. See *Part-time employees*, FAIR WORK OMBUDSMAN, <https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/part-time-employees> (last visited, June 22, 2020) (explaining part-time workers are “entitled to the same benefits as a full-time employee, but on a pro rata basis”).

These norms create less incentive for fathers to use a share of governmental parental leave benefits. Rather, to the extent fathers may (reasonably) fear that taking leave could jeopardize their own employment security, they are unlikely to do so, precisely because their income will be particularly important to the family in this period.

One final note: this Article was accepted for publication prior to the COVID-19 pandemic, but it is being finalized in the midst of the crisis. The United States has had a very high per capita infection and death rate.<sup>146</sup> Government-ordered shutdowns and changes in consumption patterns have resulted in massive levels of unemployment; the pandemic has also significantly disrupted childcare and schooling, resulting in many more women than men leaving the workforce, at least temporarily, to meet family care needs.<sup>147</sup> Australia has had a much lower per capita infection and death rate, and it has experienced less social and economic upheaval.<sup>148</sup> Some experts predict that women in the United States will continue to be disadvantaged in the labor market long after the pandemic itself subsides.<sup>149</sup> The pandemic has also heightened awareness of gaps in American social policies designed to help working parents, and it may be result in greater support for new legislation in the area. Future study will be important to assess how the pandemic and its aftermath may affect choices new parents make regarding leave.

#### CONCLUSION: ACHIEVING EQUALITY?

Descriptively, early evidence suggests that U.S. policies have been more successful than Australian in encouraging men to claim parental leave benefits, while Australian policies have been more successful than American policies in providing new mothers a reasonably ample period of time away from work. Of course, future research can play an important role in further refining these findings, assessing, for example, not only how public benefits

146. See WORLDOMETER, CORONAVIRUS CASES, [https://www.worldometers.info/coronavirus/?utm\\_campaign=homeAdvegas1?%22%20%5C%20%22countries#countries](https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1?%22%20%5C%20%22countries#countries) (visited Apr. 13, 2021) (showing U.S. per capita infection rate as 8<sup>th</sup> highest in the world and per capita death rate as 14<sup>th</sup> highest in the world).

147. See, e.g., Julie Kashen et al., *How COVID-19 Sent Women's Workforce Progress Backward*, CENTER FOR AMERICAN PROGRESS 4-5 (Oct. 2020) (gathering research showing women have been more likely than men to leave the workforce and disrupt work to meet children's needs); Misty L. Heggeness et al., *Tracking Job Losses for Mothers of School-Age Children During a Health Crisis*, U.S. CENSUS BUREAU, at fig.3 (Mar. 3, 2021), <https://www.census.gov/library/stories/2021/03/moms-work-and-the-pandemic.html> (showing from April to November 2020 labor force participation of mothers with school age children dropped much more than fathers' did, and suggesting this was likely because mothers carried a heavier burden of childcare and were more likely to work in service jobs impacted by COVID closures).

148. See WORLDOMETER, *supra* note 146 (showing Australia per capita infection rate as 174<sup>th</sup> in the world and per capita death rate as 151<sup>st</sup> in the world).

149. See, e.g., Kashen et al., *supra* note 147, at 11 (citing studies suggesting women's exit from the labor force and reduction in hours will likely widen wage gaps and that, absent sufficient government support, many childcare closures may be permanent).

are apportioned, but also how publicly-provided benefits interact with privately-provided benefits, what share of eligible parents are claiming benefits under the schemes, and whether usage patterns change as U.S. laws providing longer period of benefits are phased in. But assuming that the general pattern remains consistent, the normative assessment of which of these approaches better advances women's equality depends on how one answers the practical and theoretical questions embedded in "equality's riddle." A generation ago, when faced with this question, American lawmakers and judges chose the same treatment approach. Anti-discrimination law mandates that pregnant workers be treated the "same" as other employees, and the Family and Medical Leave Act provides equal amounts of leave to mothers and fathers. At about the same time, Australia chose the special treatment approach. It granted new mothers a year of unpaid maternity leave and structured its sex discrimination law to explicitly permit such differential treatment.

The paid parental leaves implemented in both countries rest upon these different conceptions of equality, which have distinct strengths and weaknesses. Australia now seeks to normalize men's use of leave and ensure that women and men who take time off from work are protected from workplace discrimination. And while this Article has celebrated the success of new state laws, the U.S. still lacks a federal paid leave law. Moreover, even the most generous state laws provide each parent just twelve weeks of bonding benefits. The U.S. has also failed to enact legislation providing other key supports for working parents, such as paid time off for caring for sick family members, workplace flexibility, or limits on mandatory overtime. This Article explores two models for replacing the traditional maternity and paternity leave regime with leave that is entirely gender-neutral. The next steps in the story—how to more fully protect and support mothers and fathers as workers and parents—remain to be written.